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Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,
Spokane County Prosecuting Attorney
Appellant,

vs.

SPOKANE ARCADES, INC., et al.,
Appellees,

No. 84-143

KENNETH EIKENBERRY,
Attorney General for the State of Washington, et al.,
Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,
Appellees,

On Appeal From The United States
Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY MISSISSIPPI CITIZENS FOR DECENCY THROUGH LAW IN SUPPORT OF DEFENDANTS — APPELLANTS AND BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS — APPELLANTS

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QUESTION PRESENTED

WHETHER THE DEFINITION OF "PRURIENT INTEREST" IS CONSTITUTIONALLY OVERBROAD BECAUSE IT IS DEFINED IN THE STATE STATUTE AS THAT WHICH INCITES LASCIVIOUSNESS OR LUST AND IS NOT LIMITED TO A SHAMEFUL AND MORBID INTEREST IN NUDITY, SEX, OR EXCRETION.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY MISSISSIPPI CITIZENS FOR DECENCY THROUGH LAW IN SUPPORT OF DEFENDANTS — APPELLANTS AND BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS — APPELLANTS

Mississippi Citizens for Decency through Law (MCDL) is an association of citizens organized for the purpose of combatting the commercial exploitation of

obscene materials within the State of Mississippi and her sister states throughout the country. As such, MCDL respectfully moves this Honorable United States Supreme Court, pursuant to Court Rule 36, for leave to file a Brief Amicus Curiae in support of the Appellants of the State of Washington. Consent was granted by Appellants and was not granted by Appellees.

Movant Party has a special interest in the subject matter of this appeal, having devoted considerable time over the past several years to the construction and passage of Mississippi's statute banning the sale and distribution of obscene material. This statute is now on appeal in the United States Court of Appeals for the Fifth Circuit, having been struck down by the United States District Court, Northern District of

Mississippi, for its definitions of the terms "prurient interest" and "patently offensive." The definition of prurient interest in the Mississippi statute is very similar to the definition of that term in the statute of the State of Washington presently on appeal before this Court.

Section 1(8) of House Bill 626 of the State of Washington defines "prurient" as "that which incites lasciviousness or lust." Section 2(1)(a) of House Bill 345 of the State of Mississippi defines "prurient interest" as "a lustful, erotic, shameful or morbid interest in nudity, sex, or excretion." Both statutes include the word "lust" in the definitions.

Movant Party has worked closely as an adviser in the construction of the Mississippi statute. The language of the statute was taken from existing statutes

of other states and from decisions of the United States Supreme Court. MCDL assisted the Legislature with these definitions, and therefore MCDL feels compelled to inform the Court of the source of the legislation of the Mississippi statute because of the similarity between the definition of pruriency to that of the State of Washington. MCDL feels that the provision of its references would greatly support the validity and constitutionality of that part of the Washington statute which is like that of the Mississippi statute.

MCDL is a chapter of a national organization, Citizens for Decency through Law, Inc., Phoenix, Arizona, which is well known throughout the country for its effective legal counsel in the field of anti-obscenity legislation.

Counsel for Amicus is a practicing

attorney in the State of Mississippi and has been counsel for MCDL for approximately five years. Counsel, however, seeks to present an argument as to the definition of prurient interest from the viewpoint of a constitutional lawyer interested in the prosecution and not as a viewpoint held solely by MCDL.

It is sincerely hoped that this Court will grant this Motion for Leave to File a Brief Amicus Curiae and allow MCDL to participate in this very important case, for we believe this case presents important issues for all the people of

the United States as well as those of the State of Mississippi.

Respectfully submitted,

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SUMMARY OF ARGUMENT

Amicus respectfully submits to the consideration of this Honorable Court that the definition of "prurient interest" is constitutional having been taken directly from decisions of the United States Supreme Court and the case law of other states. The conclusion that the term "lust" would permit the application of the statute to arguably protected

materials is not supported by the Supreme Court nor required by the Constitution. The Model Penal Code definition is not the only valid definition of prurience allowed by the Supreme Court, and this Court should not agree that the term is so limited. Neither is the contemporary usage of the word such that its connotation is nothing more than "sexual desire." The State of Washington therefore should be given the right to develop the concept of prurience within the guidelines of applicable law of her sister states and of the United States Supreme Court.

LAW AND ARGUMENT

THE DEFINITION OF PRURIENT INTEREST IS NOT UNCONSTITUTIONALLY OVERBROAD. PRURIENT INTEREST IS DEFINED AS THAT WHICH INCITES LASCIVIOUSNESS OR LUST AND IS NOT LIMITED TO AN APPEAL TO SHAMEFUL AND MORBID INTEREST.

The United States Court of Appeals,

Fifth Circuit, concluded that the only definition of prurient interest constitutionally valid is that given in Roth v. United States, 354 U.S. at 476, n.20, 77 Sup.Ct. at 1310, n.20 (1957). That footnote contained a section of the A.L.I.'s Model Penal Code which defined material as obscene "if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion. . . ." The Washington statute defined pruriency in Section 1(8) as "that which incites lasciviousness or lust." The Court of Appeals therefore concluded that the definition of obscenity as defined in the Washington statute was unconstitutionally overbroad.

The Court of Appeals had two main objections to the use of the term "lust" in the definition of pruriency: first, the A.L.I. definition pre-empted all

other definitions of term; and second, the modern usage of the term "lust" no longer implies shame, but it is synonymous with "sexual desire."

Miller v. California, 413 U.S. 15 (1973) is the landmark decision regarding the regulation of pornographic material. This decision does not define "prurient interest." It includes the word in the definition of obscenity. In Miller, supra, page 24, the Court said:

> "A state offense must also be limited to works where, taken as a whole, appeal to the prurient interest in sex, . . ."

This decision gave the basic guidelines for the trier of fact, which were:

> (a) Whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) Whether the work, taken as a whole, lacks serious literary,

> artistic, political, or scientific value." 413 U.S. at Page 25.

The Court was satisfied that these specific prerequisites would provide fair notice to a dealer so that he would not be prosecuted unfairly. It left to state law the definition of "prurient interest." This conclusion is inescapable when one reads from Miller, supra, at Page 31:

> Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the

> answer be based on some abstract formulation. The adversary system, with ... jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law.

The Court recognized that "godlike precision" in defining regulated materials would emasculate the power of the state and the Congress to address the problem of pornography. Miller v. California, supra, at Page 28. In discussing this problem of specificity, the Court cited in Footnote 20, United States v. Petrillo, 332 U.S. 1, 7-8 [91 L.Ed. 1877, 67 Sup.Ct. 1538], which said:

> "'. . . [T]he Constitution does not require impossible standards;" all that is required is that the language "conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices.'"

The only real definition of prurient interest offered by the Supreme Court is that in Roth v. United States, 354 U.S.

476 at 487 (1957). To assist in defining obscene material, the Court said that sex and obscenity are not synonymous, and the Court explained that "obscene material is material which deals with sex in a manner appealing to the prurient interest." In Footnote 20 the Court gave four examples of what it meant by "materials which deal with sex in a manner appealing to the prurient interest."

The first definition is the Court's own, which is the only one ever offered by the Supreme Court: "Material having a tendency to excite lustful thoughts."

The second example is from Webster's New International Dictionary (Unabridged, Second Edition, 1949), where pertinent parts of the definition are given of both "prurient" and "pruriency."

A third example is a cite from Mutual Film Corp. v. Industrial Com., 236 U.S. 230, 242, 59 L.Ed. 552, 559, 35 Sup.

Ct. 387, Ann.Cas. 1916 (C 296), and the fourth is that developed by A.L.I. Model Penal Code, Section 207.10(2) (Tent. Draft No. 6, 1957).

In citing the A.L.I. definition, the Court stated:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code. . . ." 354 U.S. 487 at 487.

It is reasonable to conclude that the Court in Roth, supra, meant only that the term "prurient interest," or "pruriency," was a term which could be defined by various courts in various ways within the parameters of the basic meaning of the word. The observation of the Court in Footnote 20 was not intended to develop all the nuances of the meaning of obscenity as required by the Constitution. To restrict the meaning of the term to the A.L.I. definition

misinterprets the intent of the Miller decision, supra, and is not supported by either case law or the plain meaning of the footnote as set forth above.

The case law to which the Miller court referred in Footnote 20 of the Roth decision, supra, supports the interpretation that material appealing to "prurient interest" can be described in other ways than "a shameful or morbid interest in nudity, sex, or excretion."

In Mutual Film Corp. v. Industrial Com., supra, at 242, this Court made the observation regarding the attraction of pornography to normal persons:

> They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to.

In Ginzburg v. United States, 383 U.S. 463 at 471 (1966), the interest is described as "the salaciously disposed."

On the next page, the Court said:

". . . they deliberately emphasized the sexually provocative aspects of the work in order to catch the salaciously disposed." (Emphasis added).

In Ginzburg v. United States, supra, Page 470, the Court observed:

"The deliberate exploitation of Petitioner's publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." (Emphasis added).

In other cases material has been considered prurient if it is sexually stimulating. It can be either attractively erotic or repulsive. Edward Mishkin v. State of New York, 383 U.S. 502, at Page 508, states as follows:

". . . do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the 'average person' in sex, that 'instead of stimulating the erotic, they disgust and sicken.' We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement." (Emphasis added).

See also, Penthouse v. McAuliffe,

610 F.2d 1353 (5th Cir. 1980) where various material was described.

Material that is sexually provocative, if the purveyor's sole emphasis is on the sexually provocative aspect, has been used to describe the prurient interest. The trial court in Splawn v. California, 431 U.S. 595, at Page 598 (1977), instructed the jury:

> "If you conclude that the purveyor's sole emphasis is on the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance." (Emphasis added).

The courts have used the words "lewd" and "lascivious" to describe prurient interest in Roth, supra, Footnote 20. The words "tend to excite lasciviousness" are used in State v. Little Art Corp., 215 N.W.2d 853, 856 (Sup.Ct.Neb. 1974). The Court has used "tendency to excite lasciviousness" with lasciviousness being defined as the

tendency to arouse sexual desire in People v. Ciampa, 394 N.Y.S.2d 727, 732 (Sup.Ct.App.Dept. 1977). Prurient interest means in State v. Barrett, 292 S.E.2d 590, 591-592 (Sup.Ct.S.C. 1982) "a shameful and morbid interest in nudity, sex, or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts."

It has also meant a "tendency to excite lustful thoughts," as well as "shameful and morbid." Spry v. State, 274 S.E.2d 2 (Ct.App.Ga. 1981). Prurient means "shameful and morbid," "excit[ing] lustful thoughts." State v. Little Art Corp., supra, at 856, and, as has already been pointed out in Roth, supra, Footnote 20, prurient interest means "having a tendency to excite lustful thoughts."

The word "prurient" means to be erotic. State v. Tidyman, 568 P.2d 666, 675 (Ct.App.Or. 1977); State v. Grabill,

579 P.2d 316, 320 (Ct.App.Or. 1977); Mishkin v. State of New York, supra, 508; Ginzburg v. U.S., supra, 470. Other state cases which discuss the meaning of prurient interest are State v. Lewitt, 222 A.2d 579, 582 (Ct.App.Conn. 1966); State v. Great American Theatre, 608 P.2d 951, 952-959 (Sup.Ct.Kansas, 1980); Little Store v. State, 453 A.2d 1215, 1216-17 (Ct.App.Md. 1983); Commonwealth v. Mascolo, 375 N.E.2d 17, 16 (App.Ct. Mass., 1978); Andrews v. State, 652 S.W.2d 370, 375-77 (Texas Ct.Cr.App. 1983), and State v. Schwing, 328 N.E.2d 379, 382 (Sup.Ct.Ohio, 1975).

In addition to the State cases in the foregoing list, the the following Federal cases serve to prove that the Washington definition of "prurient" is within the guidelines of the terms as used by the Supreme Court in other courts of the states and cannot be said to be

unconstitutionally overbroad as a matter of law.

Federal cases: U.S. v. 31 Photographs, 156 F.Supp. 350 (S.D.N.Y. 1957); U.S. v. Keller, 259 F.2d 54, 58 (3rd Cir. 1958); Eastman Kodak v. Hendricks, 262 F.2d 392, 397-98 (9th Cir., 1958); Flying Eagle Publications v. United States, 273 F.2d 799, 803 (1st Cir. 1960); U.S. v. Darnell, 316 F.2d 813, 816 (2d Cir. 1963); Interstate Circuit v. City of Dallas, 366 F.2d 590, 596 (5th Cir. 1966); Luros v. U.S., 389 F.2d 200, 203 (8th Cir. 1968); Childs v. State of Oregon, 431 F.2d 272, 275, 276 (9th Cir. 1970); U.S. v. One Reel of Film, 360 F.Supp. 1067, 1071-72 (D.Mass. 1973); U.S. v. Central Magazine Sales, 381 F.2d 821, 823 (4th Cir. 1967); U.S. v. Pinkus, 551 F.2d 1155, 1159-60 (9th Cir. 1977); and U.S. v. Battista, 646 F.2d 237, 245 (6th Cir. 1981).

The inescapable conclusion is that the Supreme Court has never required a national statutory definition of the term "prurient interest" or a specific judicial meaning of the term which precludes or disallows all other explications. The conclusion of the Appeals Court that Miller v. California, supra, refers solely to the definition offered in the A.L.I.'s 1962 Official Draft is not a reasonable or accurate interpretation of the language of that decision.

In addition to being in error regarding the legal definition of prurient interest, the Appeals Court is also in error regarding the contemporary usage of the word "lust." The Appeals Court concluded that contemporary juries would be "unlikely to connote [lust with] anything more than 'sexual desire.'" One of the bases it gave for this conclusion was Webster's Third New International

Dictionary (Unabridged, Third Edition 1976). The exact definition of lust quoted in that dictionary is as follows:

> "Sexual desire, especially of a violent self-indulgent character: Lechery, Lasciviousness."

The first meaning of the word, which generally refers to mere pleasure and gratification, is obsolete.

The definition of "lustful" from that same authority states that "lustful" means "inciting to sexual desire or imagination," and gives as synonyms the words "lascivious" and "obscene."

Both the words "prurient" and "lustful" have a derivation which implies lack of restraint. "Prurient" comes from the Latin word prurire meaning "to itch, long for, or be wanton," and from the Latin word pruna meaning "glowing coal." The word itself means "marked by restless craving; itching curiosity," or having or easily susceptible to lascivious thoughts

or desires, or intending to excite lasciviousness. It also has a derivation meaning "be signed, burns."

The derivation of the word "lust" comes from the Latin lascivus, meaning wanton or playful, but this meaning is now obsolete. What is left in modern usage is associated with extreme sexual desire, especially of the violent and self-indulgent character. The lack of restraint may be derived from "lustful," which originally meant in Latin "fond of leaping." It is now synonymous with "lechery," "lasciviousness," and "obscene."

The American Heritage Dictionary of the English Language, 1982 ed., Page 11, had an eminently outstanding usage panel who worked on the premise that good usage is clearly distinguished from bad usage and that the best people able to make the distinctions are the enlightened members

of the community. The definition of the word "lust" in both editions is given as "an intense and unrestrained sexual craving," and "an overwhelming desire or craving."

The Oxford English Dictionary and its Supplement, 1976 ed., give the chief current use of the word (noun) as "sexual appetite or desire, chiefly now exclusively implying intense moral reprobation, libidinous desire, degrading animal passion." From the examination of the history of this word in that authority, it is observed that in the past the word was associated with simply "pleasure or delight, or a desire, relish or inclination for something," but these meanings are now obsolete.

Materials which appeal to lust, therefore, are not materials which merely stimulate a "healthy" and "wholesome" sexual desire. They are materials which

arouse feelings that are likely to be indulged for self-gratification. Used in the sexual context, which is the most prevalent, it depicts powerful and unrestrained feelings. Indeed, the usage of the word in a non-sexual setting, as a "lust for power" evokes a person who goes to any length in an attempt to satisfy this intense desire. In both the sexual context and the "lust for power" context, it has none of the moral restraints that regulate our desires. It is the glowing coal of pruriency, not an innocuous sexual desire. Therefore, it is likely to burn those who are its object. It describes an animal feeling, not an admirable or normal interest in sex. It is a shameful interest.

The fact that President Carter admitted to "committing adultery in his heart many times" in no way proves that lust has an acceptable connotation. He

was describing frankly a shameful interest. A well-known born-again Christian, Mr. Carter was no doubt familiar with Matthew 8:28 which states: "Whoso looketh on a woman to lust after her hath committed adultery with her already in his heart." Since adultery to a born-again Christian is a sin, it is the obvious conclusion that the word "lust" is not expressive of a healthy, admirable Christian trait; and certainly President Carter was familiar with James 1:15 which states: "When lust hath conceived, it bringeth forth sin, and sin, when it is finished, bringeth forth death." President Carter was not bragging or explaining that everyone has a strong sex drive. He was advancing the Christian idea that we are all sinners, even the President of the United States.

The Appeals Court has fallen into the trap which we were warned about in

both the Roth and Miller courts that we should not conclude that sex and obscenity are the same. As far as obscenity law is concerned, the fact that President Carter wrote in Playboy Magazine that he had "committed adultery in [his] heart many times," merely points out that President Carter responds to sex and attractive women in a way that is morally forbidden. The attraction may or may not be prurient, but even if it were, neither his adulterous response nor the sexy women who caused it would be considered obscene, unless, of course, the activity in which they were engaged met all three (3) prongs of the Miller decision.

The fact is that our leading "couturiers, performers and manufacturers of soft drinks, soapsuds and automobiles" are, as the Appeals Court has pointed out, selling daily materials and performances which arouse lust. Most of these

materials and performances are not obscene in the legal sense because they do not meet the requirements of the Miller Court. Amicus would argue, however, that this type of material and performances with its appeal to the prurient interest of millions of people throughout this country is not a healthy appeal, and that, while this appeal has no doubt sold many products, it is one of the causes of the perversion of our normal sexual instincts to the morbid and shameful interest in sex, which is now expressing itself in the morbid and shameful activities of child abuse, incest, and rape.

Including the word "lust" in the definition of prurience does not, however, cause those products discussed above to be obscene, unless they meet other requirements of the Miller test, which are set forth in Miller, supra,

Page 24. Therefore the use of the word in the definition does not infringe on protected materials. The use merely explicates fully the definition of prurient interest. A modern jury may not understand an instruction which includes simply an appeal to the "prurient interest." It might not understand, either, the word "lascivious." A modern jury, however, would surely understand an instruction which told them that prurient interest is synonymous with lust. They would understand that materials which appeal to lust are those materials which arouse violent sexual desire devoid of the restraints generally imposed by a civilized culture on its sexual life.

To fully understand the definition of prurient interest, it is necessary to examine an argument regarding to where the appeal is to be made. Hamling v. United States, 418 U.S. 87 at Page 128

(1974). In Hamling petitioners argued that the District Court's instruction was improper because it allowed the jury to measure the material by its appeal not only to the average person but also to a clearly defined deviant group. It was agreed that, if some of the material appealed to the prurient interest of sexual deviants and some to the prurient interest of the average person, a general finding that the material appeals to a prurient interest is somehow precluded. The Court rejected the argument in Hamling, supra, Pages 128 and 129, and quoted Mishkin as follows:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the "average"or "normal" person in Roth, . . . does not foreclose this holding. . . . We

> adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible- person facet of the [Regina v.] Hicklin [[1868] LR 3 QB 360] test. 383 U.S., at 508-509, 16 L.Ed. 56 (footnotes omitted). (Emphasis added).

As the above quotation illustrates, it is proper to instruct the jury that it may measure the material 'by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant group." Hamling, supra, at Page 128.

Some confusion, however, has taken place regarding whether or not the appeal is to the prurient interest of the average person applying contemporary community standards or whether or not the average person, if the average person

applied those standards, would find the appeal to a prurient interest. Indeed, in Mishkin v. New York, supra, at Page 508 (1966) the Court said:

> Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that "instead of stimulating the erotic, they disgust and sicken." We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement. (Emphasis added).

The guidelines of Miller, supra, however, stated that:

> "The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest." Miller v. United States, 413 U.S. 15 at Page 24 (1973). (Emphasis added).

And on Page 30 the same Court said:

> When triers of fact are asked to decide whether the 'average person applying contemporary community

> standards' would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation." (Emphasis added).

And Roth, supra, at Page 489 stated that: "Whether to the average person, applying contemporary standards. . . ."

This concept is important because, as is plainly set out above, the appeal is not to an erotic interest, or to a shameful or morbid interest in an average person or in the jury. To misunderstand the nicety of law is to allow defense attorneys to gain acquittal on the basis of an instruction urging the jury to acquit the Defendant if the average person is unaffected by the material charged. This concept was discussed in Trial Magazine, Vol. 14, No. 5 (A.T.A.A., May, 1978) entitled "The Defense of an Obscenity Prosecution." The author recounted the tactics of gaining an acquittal by a Defendant charged with

selling bestiality films by arguing that if the films aroused the jury to participate in bestiality, then the Defendant was guilty, but if the jury found the materials repulsive and disgusting and not appealing to the sexual desires of the average person, then the Defendant was to be acquitted. It follows that the law on obscenity would be rendered ineffective if the Court charged a jury that they must find the matter obscene, if at all, only when it appeals or excites a shameful or morbid interest in an average person or in the jury.

In reference to Hamling, supra, where the question of appeals to prurient interest or sexual deviance was discussed, see State v. Tidyman, 568 P.2d 666, 674 (Ct.App.Or. 1977), where the question was discussed as to whether the appeal of material would be to a generally erotic or shameful interest in sex or whether

that interest was to an average person or that of a deviant class.

In addition to considering the concept of appealing to the prurient interest of the average person, the concept of the commercial exploitation of obscene material, or the concept of pandering, needs to be explored. Understanding the development of the pandering concept illustrates what is meant by prurience, rather than that term being limited to the "shameful and morbid."

Pandering is a term of art in obscenity law which deals with the exploitation of the prurient nature of the material rather than a legitimate interest in sex. In Miller, supra, at Pages 34 and 35, the Court discusses work which are protected by the First Amendment and contrasts the "free and robust exchange of ideas and political debate with exploitation of obscene material."

It said that "But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter." Clearly, the matter of commercial gain or pandering is a factor to be considered in assessing speech as unprotected by the First Amendment. The Court's development of the pandering concept illustrates that the motivation of the distributor is very much a part of obscenity law. "Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test." Ginzburg, supra, at Page 470, 471. The development of this concept led the Court to conclude in Splawn v. California, 431 U.S. 595, Page 598 (1977):

There is no doubt that as a matter

> of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.

This clearly is a reflection of the principles in Ginzburg v. United States, 383 U.S. at 466, in which it was concluded by the Court that it was viewing the material "against the background of commercial exploitation of erotica solely for the sake of their prurient appeal." The Court, quoting Roth v. United States, supra, at Page 495, described the advertising and promotion which took place in order to sell the material:

> ". . . each of the accused publications was originated or sold as stock in trade of the sordid business of pandering - 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'"

At Page 465 of Ginzburg, supra, the Court in explaining the reason that it admitted

as relevant the evidence of commercial exploitation of sex said that "Standing alone, the publications themselves might not be obscene."

In U.S. v. Pinkus, 436 U.S. 253 at 303-304 (1978), the Court made it clear that it would consider motivation as being relevant to the ultimate evaluation of the material:

> This was not a so-called finding instruction which removed the jury's discretion; rather it permitted the jury to consider the touting descriptions along with the material themselves to determine whether they were intended to appeal to the recipient's prurient interest in sex, whether they were "commercial exploitation of erotica solely for the sake of their prurient appeal," Ginzburg, supra, at 466, 16 L.Ed.2d 31, 86 S.Ct. 942, if indeed the evidence admitted of any other purpose. And while it is true the Government offered no extensive evidence of the methods of production, editorial goals, if any, methods of operation, or means of delivery other than the mailings and the names, locations, and occupations of the recipients, the evidence was sufficient to trigger the Ginzburg pandering instruction.

Other courts have applied this principle, as, for example, the Supreme Court of Indiana, which upheld the pandering instruction upon the evidence that the materials were sold from "adult" bookstores, clearly marked as such, and openly dealing in sexual devices, books and films of an explicit pornographic nature. Sedelbauer v. State, 428 N.E.2d 206, at 207-08 (Supreme Court of Indiana, 1981), cert.den. 455 U.S. 1035 (March 22, 1982).

The pandering concept and its relationship to pruriency is shown in the charge to the jury in Splawn, supra, at 598:

> If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance. (Emphasis added).

The Court referred to Ginzburg, supra, at Page 470.

> The deliberate representation of petitioners' publications as erotically arousing for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. (Emphasis added).

The Model Penal Code, Commentaries, supra, at 496-498, followed the Roth theory that determining the predominant appeal to prurient interest "necessarily entails an inquiry into what other appeal the material may have." This approach was the basis for the Supreme Court's recognition of the worth of evidence of "pandering" to judge materials obscene even if the material was not obscene without the commercial exploitation by the panderers. The Model Penal Code, Section 251.4(4)(e) had specifically provided for evidence of "pandering" to show "appeal to prurient interest, or absence thereof, in advertising or other promotion of the material."

The Model Penal Code also allowed

for the admissibility of evidence of "artistic, literary, .scientific, industrial or other merits of the material." Model Penal Code, Commentaries, Section 251.4(4)(e). The Miller court adopted the concept as well as that of recognition of the evidence of pandering. This does not mean that a jury should make a determination that "certain material either has or has not sufficient positive value to outweigh its objectionable aspects." Model Penal Code, Commentaries, supra, at 496-98. The A.L.I. rejected this type of evaluation because it felt that criminal juries should not have to deal with artistic sensibilities or artistic merit. Rather they allowed for evidence of "artistic, literary, scientific, or educational" value to determine what other appeal, if any, the material might have.

Clearly, therefore, commercial

exploitation of the interest in sex and the "artistic, literary, scientific or educational" value of the material, if any, are important ingredients of understanding the appeal to prurient interest.

CONCLUSION

Amicus submits that the case law and usage supports the inclusion of the word "lust" in the Washington statute and would pass constitutional muster by the Supreme Court. The language found overbroad by the Ninth Circuit of the United States Court of Appeals cannot be said to be unconstitutionally overbroad as a matter of law.

Amicus wishes to thank this Court for the opportunity to express the opinions herein and provide further precedents for this Court's consideration of this issue of great importance to the people of Washington and to the rest of

the States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this ____ day of November, 1984, the original and 40 copies o the within Amicus Curiae Brief were deposited in the United States Post Office in Jackson, Mississippi, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below-listed parties to the proceedings and that all parties required to be served have been served.

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